89-143

No. .

In the

Supreme Court of the United States.

OCTOBER TERM, 1988.

PAUL A. LATRAVERSE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

I. Whether state law applies to a proceeding to suppress evidence in the context of a federal forfeiture proceeding where the items which served as the basis for the forfeiture action were the result of the execution of a state search warrant executed by state law enforcement officers without any federal participation in the search.

II. Whether local police officers complied with the knock and announce rule set forth in 18 U.S.C. § 3109, where the police knocked on Claimant's apartment side door, identified themselves, and entered Claimant's apartment within five to ten seconds without stating their purpose, while another group of police officers kicked open Claimant's apartment front door without knocking, identifying themselves or stating their purpose after knocking on and kicking through the outer front door to the apartment building.

Parties Below.

The parties to the proceeding in the United States Court of Appeals for the First Circuit were those parties named in the caption of the case in this Court, and Paul A. Latraverse, Sr., claimant-owner of the Defendant Real Property.

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No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1988.

ONE PARCEL OF REAL PROPERTY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The Claimant, Paul A. Latraverse, Sr., respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on April 21, 1989.

Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit, as yet unreported, is reproduced in the Appendix. The opinion of the District Court for the District of Rhode Island is reported at 696 F.Supp. 783, and is set forth in the Appendix.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on April 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

1. The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

2. 21 U.S.C. § 881. Forfeitures

> (a) Property subject
> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . . . .
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole or any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to

facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(As amended Pub.L. 98-473, Title II, Secs. 306, 309, 518, Oct. 12, 1984, 98 Stat. 2050, 2051, 2075; Pub.L. 99-570, Title I, Secs. 1006(c), 1865, 1992, Oct. 27, 1986, 100 Stat. 3207-7, 3207-54, 3207-60; Pub.L. 99-646, Sec. 74, Nov. 10, 1986, 100 Stat. 3618; Pub.L. 100-690, Titles V, Vi, Secs. 5105, 6059, 6074, 6077(a), (b), 6253, Nov. 18, 1988, 102 Stat. 4301, 4320, 4323-4325, 4363).

3. 18 U.S.C. § 3109. Breaking doors or windows for entry or exit

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

(June 25, 1948, c. 645, 62 Stat. 820.)

4. Rule 41(h) of the Federal Rules of Criminal Procedure, provides in pertinent part as follows:

Rule 41. Search and Seizure

. . . . . .

(h) Scope and Definition. . . . . The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. . . . .

(As amended Apr. 26, 1976, eff. Aug. 1, 1976; July 30, 1977, Pub.L. 95-78, Sec. 2(e), 91 Stat. 320; Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 9, 1987, eff. Aug. 1, 1987.)

5. Rule 41(c) of the State of Rhode Island District Court Rules of Criminal Procedure, provides in pertinent part as follows:

Rule 41. Search and seizure.

. . . . . .

(c) Issuance and Contents. . . . The warrant shall direct that it be served in the daytime, unless for good cause shown it provides for its execution at any time of day or night.

Statement of the Case.

On June 28, 1986, a Rhode Island state district court judge issued a search warrant for a portion of the premises located at 147 Division Street, Woonsocket, Rhode Island, upon complaint of the Chief of the Woonsocket Police Department. The affidavit in support of this warrant was executed by a Woonsocket Police Detective. On July 1, 1986, at about 9:30 P.M., members of the Woonsocket Police Department executed this warrant, and, during the search, a quantity of cocaine and narcotics paraphernalia were seized. On February 2, 1987, the defendant real property, with buildings, appurtenances, and improvements, was seized by deputies of the United States Marshall Service under authority of a federal seizure warrant issued by a United States Magistrate pursuant to Title 21, United States Code, Sections 881(a)(7) and 881(b). Subsequent to this seizure, Jacqueline (Latraverse) Price filed a claim and posted a bond with the Drug Enforcement Administration,

causing the United States Attorney, on April 14, 1987, to file a complaint for forfeiture *in rem* against the defendant real property. In this complaint, the Government alleged that approximately 380 grams of cocaine was seized pursuant to the state search warrant. Further, the Government alleged in an affidavit attached to its Complaint for Forfeiture In Rem, that on November 12, 1986, Paul A. Latraverse "was convicted in the United States District Court for the District of Rhode Island of possession with intent to distribute cocaine, a controlled substance, in violation of 21 United States Code, section 841(a)(1)".

On May 1, 1987, the Claimant, Paul A. Latraverse, filed a Notice of Claim and an Answer to the Complaint. On May 4, 1987, Jacqueline Price filed a Notice of Claim and, on May 18, 1987, Price filed an Answer. On May 28, 1987, the Eastland Bank filed a Claim and an Answer.

Procedural skirmishing followed the filing of the Notices of Claim. On October 8, 1987, Paul A. Latraverse and Jacqueline Price filed a Motion to Suppress wherein they alleged that the executing officers failed to knock and announce their identity and purpose, and wait a reasonable time, before entering the targeted premises. Additionally, Latraverse and Price alleged that the state search warrant unlawfully authorized a nocturnal search. Thereafter, the Claim of Paul A. Latraverse was stricken and later reinstated, and the Claim of Jacqueline Price was dismissed and summary judgment was entered against her.

An evidentiary hearing was held on Claimant's Motion to Suppress on February 11, 1988. At this hearing, the Claimant introduced the state search warrant, warrant affidavit and inventory; and a photograph of a building located at 147 Division Street, Woonsocket, Rhode Island. Claimant presented testimony from four Woonsocket police officers.

The testimony at the motion to suppress hearing indicated that the state search warrant was executed on July 1, 1986, at

about 9:30 P.M. It was dark outside when the search began. Four police officers reported to the side entryway to 147 Division Street, while another group consisting of at least two officers responded to the front door of the apartment building. A third team of officers took positions around the building's perimeter.

An officer named Landreville jogged up the driveway to the apartment building toward the side entrance. He was accompanied by three officers. Landreville could see and hear officers "pounding" on the front door of the apartment house as he jogged toward the side entrance. It took Landreville "a matter of seconds" to jog from the beginning of the apartment driveway to the side entrance. Landreville observed an individual exit the side entrance onto a porch. This individual was detained by one of the officers. Landreville, who was the first officer to enter the building, opened an outer screen door, entered the hallway, knocked on the apartment door, stated the word, "Police", turned the door knob to the apartment door, opened the door and entered the apartment. According to Landreville, five to ten seconds elapsed from the time he knocked on the side, apartment door before he opened this door. A second officer named Flood followed on the heels of Landreville. Flood did not hear Landreville knock on the apartment door. Flood could not recall if Landreville stated the word, "Police" prior to opening the apartment door. Flood did hear "banging and yelling" at the front door while he was inside the hallway. According to Flood, it took Landreville two or three seconds to open the outer screen door, enter the hallway, open the apartment door and enter the apartment. Approximately thirty to forty seconds elapsed from the time Flood exited his cruiser until he entered the apartment.

Once inside the apartment, Flood observed Paul Latraverse and others inside a bathroom. These persons were placed under arrest. After Latraverse was handcuffed and while he was sitting in the kitchen, Flood displayed the search warrant to him.

Meanwhile, the team of officers that responded to the front door of the apartment building encountered some difficulty. The front door to the apartment building was a four-paneled solid oak door. An Officer named Pion knocked on this door once and announced his presence. Pion waited twenty or thirty seconds, not "a very long time", after which he kicked one of the panels two or three times. This panel was removed and one of the officers reached inside and unlocked the deadbolt lock. Pion then entered a hallway, went down another hallway, and observed the entry door to the first floor apartment. This door was locked. A Lieutenant Tempest, with a single kick, kicked the apartment door open. Neither Pion nor Tempest knocked or announced themselves before Tempest kicked open the front apartment door. Pion walked through the parlor, by a bathroom, and then into the kitchen. Latraverse was sitting in the kitchen, not handcuffed.

A subsequent search of the apartment revealed the presence of cocaine and narcotics paraphernalia inside the bathroom. Cocaine was also seized from other areas inside the apartment and from Latraverse's wallet.

On May 20, 1988, the District Court entered a Memorandum and Order denying Claimant's Motion to Suppress. 696 F.Supp. 783 (App. 9a-21a). In its Memorandum and Order, the District Court ruled that it would not consult state law to determine the validity of the executing officers' conduct. 696 F.Supp. 783, 784-787 (App. 9a, 12a-18a). The District Court concluded that the officers' forced entry was reasonable, and, because the court declined to resort to the law of the State of Rhode Island, no ruling was made on Claimant's contention that the search warrant was invalid on grounds that the supporting affidavit failed to show "good cause" for a nighttime search. 696 F.Supp. 783, 788 (App. 9a, 20a-21a).

On June 1, 1988, the Government filed a Motion for Summary Judgment which the District Court allowed on June 28,

1988, and on July 21, 1988, the Government requested entry of final judgment and a decree of forfeiture. On July 26, 1988, an Order of Forfeiture was entered (App. 7a-8a). On July 28, 1988, the Government and the Claimant, Eastland Savings Bank, filed a stipulation with respect to the Bank's Claim.

On August 3, 1988, Claimant, Paul A. Latraverse, filed a Motion to Stay Execution of Judgment pending appeal, and on August 4, 1988, Latraverse filed a Notice of Appeal to the United States Court of Appeals for the First Circuit. On September 12, 1988, Claimant's Motion to Stay Execution was granted by the District Court.

The United States Court of Appeals for the First Circuit affirmed the decree of forfeiture by decision entered on April 21, 1989 (App. 1a-6a).

Reasons for Granting the Writ.

1. The United States Court of Appeals for the First Circuit held below that state law did not apply to this federal forfeiture proceeding even though the items which served as the basis for this forfeiture action were procured by state law enforcement officers who executed a state search warrant without any federal participation in the search.

Claimant contended below that the propriety of the search and seizure should be determined by applying state and federal law.

This case presents "an important question of federal law which has not been, but should be, settled by this Court." U. S. Sup. Ct. Rule 17.1.(c), 28 U.S.C. Additionally, there is conflict with respect to this question among the federal courts of appeal and district courts.

Claimant requested the courts below to determine the validity of a state search warrant by referring to local rules of criminal procedure. Claimant further asked that the validity of the search warrant and the conduct of the executing officers be determined by reference to the Constitution of the State of Rhode Island, as well as federal law.

In *Elkins* v. *United States*, 364 U.S. 206, 223 (1960), this Court held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible . . . in a federal criminal trial." There, Oregon state officers conducted a search and seizure violative of the Fourth Amendment. The state courts of Oregon had adopted the federal exclusionary rule. *Elkins*, of course, applied as well to those federal prosecutions occurring in districts where the state had not adopted the exclusionary rule.

Since the time of *Elkins* and *Mapp* v. *Ohio*, 367 U.S. 643 (1961), certain of the states have interpreted their own state constitutions to provide rights broader than those guaranteed by the Fourth Amendment. See *Oregon* v. *Hass*, 420 U.S. 714 (1975). The Supreme Court of Rhode Island has determined that Article I, Sec. 6, of the Rhode Island Constitution affords the citizens of Rhode Island greater protections than those provided under the Fourth Amendment. *State* v. *Von Bulow*, 475 A.2d 995, 1019-1020 (R.I. 1984). Any reluctance to apply state law under the circumstances presented in this case clearly undermines the policies of the State of Rhode Island with respect to state search and seizure law. This argument was recognized by the Ninth Circuit in *United States* v. *Henderson*, 721 F.2d 662, 665 (9th Cir. 1983), wherein the court there stated in dictum that "federal courts should, in the interest of comity, defer to a state's more stringent exclusionary rule with respect to evidence secured without federal involvement."

In the instant case, the refusal of the District Court to apply state law in assessing the validity of a state search warrant and the manner in which state officials executed it rewards the Woonsocket police for disregarding the Constitution of Rhode Island and Rhode Island rule of criminal procedure. Rhode Island state law, at the time of the seizures in this case, had no provision for the forfeiture of realty. See Rhode Island Statutes, 21-28-5.04. Nevertheless, the Woonsocket police may receive ownership to 147 Division Street under authority of 21 U.S.C. § 881(e)(1)(A) and 19 U.S.C. § 1616a(c). Consequently, the exclusionary rule is needed to deter the Woonsocket police from conducting lawless searches and seizures. Indeed, the District Court, in holding that state law did not apply to these proceedings, relied upon the First Circuit case of *United States* v. *Aiudi*, 835 F.2d 943 (1st Cir. 1987), *cert. denied*, 108 S.Ct 1273 (1988), a case involving the Woonsocket police who executed a defective state warrant with the participation of a federal agent who was empowered by federal statute to make a warrantless search and seizure. Further, the United States likewise would be rewarded in the event it retained title to 147 Division Street or kept all or a portion of the proceeds following a sale thereof. The District Court's denial of Claimant's Motion to Suppress permitted the federal prosecutor to introduce evidence illegally seized by state officials.

The courts below found that state law did not apply to these proceedings and hence, Claimant's reliance upon state rules of criminal procedure was unavailing. In particular, Claimant urged that the affidavit in support of the search warrant failed to comply with local procedure and that therefore, the warrant was fatally defective and the searches and seizures were illegal. Rhode Island Dist. R. Crim. P., Rule 41(c), requires a showing of "good cause" to authorize nocturnal execution. The Reporter's Notes to this rule provide "that the showing of good cause

shall be in writing and be contained in the affidavit." There were no facts alleged in the warrant affidavit to justify the issuance of a nighttime warrant. However, the courts below determined a showing of good cause was unnecessary since under Fed. R. Crim. P. Rule 41(h), the search began in the daytime. *United States* v. *One Parcel of Real Prop. In Woonsocket, R.I.*, 696 F.Supp. 783, 788 (D.C. R.I. 1988) (App. 9a, 20a-21a), *aff'd*, F.2d (1st Cir. 1989) (App. 1a, 3a).

With respect to Claimant's position that state law applied to these proceedings, the District Court Judge wrote that "[w]hile I would have presumed otherwise, this is a fairly disputed point among the federal district courts and courts of appeal." *United States* v. *One Parcel of Real Prop. In Woonsocket, R.I.*, 696 F.Supp. at 784 (App. 12a).

In *United States* v. *Speaks*, 649 F.Supp. 1065 (E.D. Wash. 1986), the court there relied on *United States* v. *Henderson*, 721 F.2d 662, 664 (9th Cir. 1983) (per curiam), *cert. denied*, 467 U.S. 1218 (1984), in invalidating a state search warrant under a state constitution, where local law enforcement officers executed the warrant prior to the arrival of federal agents. Again, the court in *United States* v. *Koller*, 559 F.Supp. 539, 540 (E.D. Ark. 1983), citing *United States* v. *McCain*, 677 F.2d 657 (8th Cir. 1982), applied state rules of criminal procedure in determining the propriety of a search that allegedly began after "nighttime". Also, in *United States* v. *D'Alo*, 486 F.Supp. 945, 948 (D.R.I. 1979), the court applied state law in a federal prosecution in determining the lawfulness of an arrest by state officials for a state offense. Additionally, the applicability of state law in a federal prosecution has arisen with respect to wire interceptions secured by state or joint federal-state investigation. In *United States* v. *Bascaro*, 742 F.2d 1335, 1347 (11th Cir. 1984), the court adopted the interpretation given the federal wiretap statute (18 U.S.C. §§ 2510 et. seq.) by the Second and Tenth Circuits "that the require-

ments of state and federal law govern a federal district court's determination of the validity of wiretap warrants obtained by state law enforcement officers in state courts." See also *United States* v. *Jarabek*, 726 F.2d 889, 898 (1st Cir. 1984), wherein the First Circuit held that the more restrictive Massachusetts interception statute did not apply to a joint federal-state investigation "conducted primarily by the federal agents and under the express authority of the Department of Justice."

Other courts, however, have taken the position that federal courts should ignore state law in determining suppression issues in a federal criminal proceeding. See, e.g., *United States* v. *Jorge*, 865 F.2d 6, 10 n.2 (1st Cir. 1989); and *United States* v. *Pforzheimer*, 826 F.2d 200 (2d Cir. 1987) (citing cases from six other circuits). However, of these cases listed in *Pforzheimer*, the cases of *United States* v. *Infelice*, 506 F.2d 1358 (7th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975), and *United States* v. *Castillo*, 449 F.2d 1300 (5th Cir. 1971) (per curiam), which involve challenges to wiretaps based upon state law, are unclear whether the wiretaps were done at the direction of state and/or federal agents. Additionally, the case of *United States* v. *Shaffer*, 520 F.2d 1369 (3d Cir. 1975), *cert. denied*, 432 U.S. 1051 (1976), another wiretap challenge cited in *Pforzheimer*, involved a joint state-federal investigation. Finally, the cases of *United States* v. *Combs*, 672 F.2d 574 (6th Cir.), *cert. denied*, 458 U.S. 1111 (1982), and *United States* v. *Miller*, 452 F.2d 731 (10th Cir. 1971), *cert. denied*, 407 U.S. 926 (1972), cited in *Pforzheimer*, concern the propriety of a warrantless automobile stop search, and arrest.

Thus, the First, Second, and Eight Circuit Courts of Appeal have held that state law must be ignored in a federal proceeding in determining the validity of a state search warrant secured and executed solely by state officials. The Ninth Circuit in dictum in *Henderson*, *supra*, which was relied upon in *United*

States v. *Speaks, supra* (E.D. Wash. 1986), held that state law should be consulted. The Court in *United States* v. *Koller, supra* (E.D. Ark. 1983), citing *United States* v. *McCain*, 677 F.2d 657 (8th Cir. 1982), referred to state law. The Eighth Circuit in *United States* v. *McCain*, declined to apply Fed. R. Crim. P. 41(c)(1) in assessing the validity of a state search warrant where there was insufficient federal participation in the investigation.

Accordingly, since this case presents an important question of federal law that is in dispute among the federal courts of appeal and district courts as outlined above, this Court should grant this writ of certiorari and settle this question.

2. The District Court judge found that under federal law, the manner in which the executing officers gained entry to Claimant's apartment was reasonable. The District Court did not rule on Claimant's assertion that the executing officers' failure to announce their purpose prior to entering Claimant's apartment constituted an illegal entry which invalidated the subsequent search and seizures. *United States* v. *One Parcel of Real Prop. In Woonsocket, R.I.*, 696 F.Supp. at 783 (App. 9a). The First Circuit Court of Appeals, after concluding that state law did not apply to this proceeding, addressed Claimant's contention that the manner in which the officers made entry into the apartment violated 18 U.S.C. § 3109. The Appeals Court found that the five to ten second wait by the team of officers at the side door was reasonable for two reasons: first, that the occupants of the apartment "presumably" heard the team of officers banging on the front door and shouting "Police"; and secondly, that cocaine is a disposable commodity justifying a "shorter wait before entry." *United States* v. *One Parcel of Real Property, Etc.*, F.2d at (App. 4a-5a). The Appeals Court further determined that the failure of the police to announce their purpose nevertheless satisfied the notice requirements under Sec. 3109 since "claimant's percep-

tions" would not have been effected by additional notice. *Id.* (App. 5a-6a).

Under federal law, the execution of search warrants is governed by 18 U.S.C. Sec. 3109, which provides as follows:

> Sec. 3109. Breaking doors or windows for entry or exit
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109, is a codification of the common law rule that an officer must first knock and announce his identity and purpose and wait a reasonable period of time before breaking into and entering premises to execute a search warrant. See *Miller* v. *United States*, 357 U.S. 301, 313 (1958); *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968).

In *United States* v. *Bustamante-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973), the Court there articulated the purpose of 18 U.S.C. § 3109, as follows:

> Three interests are said to be served by the rule of announcement: (1) it reduces the potential for violence to both the police officers and the occupants of the house into which entry is sought; (2) it guards against the needless destruction of private property; and (3) it symbolizes the respect for individual privacy summarized in the adage that "a man's house is his castle."

(Citations omitted.)

Based upon facts as found by the District Court Judge from the hearing on the Motion to Suppress, Claimant asserts that the executing officers violated 18 U.S.C. § 3109, by the manner in which they made entry into 147 Division Street. Claimant contends that Officer Landreville's account of his entry as found by the District Court demonstrates a patent violation of 18 U.S.C. § 3109. Landreville testified that he opened an outer screen door without knocking and announcing. He then approached the inner apartment door, knocked on it, and stated the word, "Police". After waiting five to ten seconds, Landreville turned the door knob to the apartment door, opened the door and entered the apartment. The District Court Judge found that Landreville kicked down this door. *United States* v. *One Parcel of Real Prop. In Woonsocket, R.I.*, 696 F.Supp. at 784, 788 (App. 9a, 11a). Claimant contends that this waiting period of five to ten seconds was insufficient to comply with 18 U.S.C. § 3109.

The District Court Judge in the case at bar made no findings nor was any evidence introduced that Pion's knocking on the front door to the apartment building or Landreville's knock at the side door to the apartment was audible inside the apartment. The Court of Appeals, however, found that the front door knocking or "fracas" "presumably was being heard in the apartment". *United States* v. *One Parcel of Real Property, Etc.*, F.2d at (App. 4a, 6a). Claimant respectfully asserts that the Appeals Court erred in determining that the occupants of the apartment heard the knocks on the front or side doors, as no such evidence was presented at the suppression hearing and the District Court Judge made no such findings.

Once a Claimant establishes a prima facie case, the burden shifts to the Government to establish compliance with § 3109. *United States* v. *Gardner*, 553 F.2d 946, 949, *rehearing denied*, 559 F.2d 29 (5th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

In the instant case, no testimony was offered that the police heard movement followed by silence within Claimant's apartment prior to making a forced entry. No witness testified to hearing sounds such as scurrying footsteps, running water or flushing toilets emanating from inside Claimant's apartment which would indicate that rapid entry was necessary to prevent the destruction of evidence. No testimony was presented that the Woonsocket police observed individuals inside the apartment or heard suspicious noises from the inside of the apartment that would warrant a reasonable belief that the inhabitants were obtaining weapons in order to resist the officers' entry. See *United States* v. *Ruminer*, 786 F.2d 381, 384 (10th Cir. 1986). Accordingly, since no evidence was presented that the occupants of the apartment were aware of the police presence at the front door to the apartment building, Officer Landreville's testimony that he waited merely five to ten seconds was insufficient time to constitute refused admittance under 18 U.S.C. § 3109.

Claimant notes that the courts below found that the police complied with § 3109. No findings or conclusions were made below that the Woonsocket police were excused from complying with § 3109, based upon one or more of the recognized exceptions to this statute. See *Ker* v. *California*, 374 U.S. 23, 47 (1963) (Brennan, J., dissenting).

Finally, the testimony adduced during the hearing on Claimant's Motion to Suppress was uncontradicted that the police failed to announce their *purpose* prior to entering the apartment. Officer Landreville testified that he stated the word, "Police", and Sergeant Flood said, "Let's go in", before the side apartment door was opened. Detective Flood testified that he heard Lieutenant Tempest at the front door yelling, "Police, let us in". Officer Pion testified that he knocked on the front door, and "we announced our presence".

The District Court Judge made no findings that the executing officers stated their purpose before breaking and entering the apartment. The Court of Appeals, as noted above, found that the occupants of Claimant's apartment "presumably" heard the pounding and shouting of the word "Police" at the front door, and notice as to purpose would therefore apparently be a "useless gesture", since the occupants "should have little doubt of the police purpose." *United States* v. *One Parcel of Real Property, Etc.*, F.2d at (App. 5a-6a). Again, Claimant respectfully contends that the record does not support a finding that the occupants of the apartment heard or were otherwise aware of the police presence at the front door to the apartment building.

In *Miller* v. *United States*, 357 U.S. 301 (1958), police officers responded to Miller's apartment for the purpose of affecting his arrest on narcotics violations. Two officers went to Miller's apartment door. One of the officers knocked on the door. A person from within the apartment inquired, "Who's there?" One of the officers responded, "Police." The defendant opened the door slightly, which was equipped with a chain lock, and asked the two officers what their business was. Before either officer could respond, the defendant began to shut the door, whereupon the officers inserted their hands inside the door, forced the chain, and entered the apartment. *Id.* at 303-304. This Court, in ruling that this manner of entry violated 18 U.S.C. § 3109, observed that this statute "seems to require notice in the form of an express announcement by the officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirement in this case." *Id.* at 309-310. The petitioner in *Miller* was aware of the purpose of the police at his doorway. ("A majority of the Court of Appeals has concluded that petitioner, at the time the police entered his apartment, 'already

fully understood who the officers were and that they sought to arrest him.'" *Id.* at 314 (Clark, J., dissenting) (citation omitted). See also *Jackson* v. *United States*, 354 F.2d 980, 982 (1st Cir. 1965).

Since the executing officers failed to state, prior to making entry, that they were present at the apartment for the purpose of executing a search warrant, such entry was illegal. This illegal entry invalidated the subsequent search and seizures.

Claimant contends that the decision of the Court of Appeals with respect to the notice requirement under § 3109 is in conflict with the decision of this Court in *Miller* v. *United States*, 357 U.S. 301 (1958). This Court should therefore grant this petition for certiorari.

Conclusion.

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

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APPENDIX A

United States Court of Appeals

For the First Circuit

No. 88-1817

UNITED STATES OF AMERICA,
Plaintiff, Appellee,
v.
ONE PARCEL OF REAL PROPERTY, ETC.,
Defendant, Appellee.

PAUL A. LATRAVERSE, SR.,
Claimant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. Raymond J. Pettine, *Senior U.S. District Judge*]

Before
Selya, *Circuit Judge*
Aldrich and Coffin, *Senior Circuit Judges*.

John A. Baccari with whom *Thomas C. Troy* and *Troy & Baccari* were on brief for appellant.

Michael P. Iannotti, Assistant United States Attorney, with whom *Lincoln C. Almond*, United States Attorney, was on brief for the United States.

April 21, 1989

ALDRICH, *Senior Circuit Judge*. This is an appeal by claimant-owner of a multi-dwelling building in Woonsocket, Rhode Island, from a decree of forfeiture pursuant to 21 U.S.C. § 881(a)(7). We affirm.

At 9:30 P.M. on July 1, 1986, Rhode Island police officers executed a search warrant, and, during the search of the building, seized various narcotics paraphernalia and a quantity of cocaine. This proceeding followed. Claimant moved to suppress the seized material, alleging that the police unjustifiably failed to comply with the knock and announce rule governing house searches, and that the warrant was executed at night without good cause. Claimant concedes that this latter argument fails if federal law controls, it still being "daytime" by the federal definition, Fed. R. Crim. P. 41(h), but contends that, because the warrant was executed by state police without any federal participation, state law should control.

If the state police were doing what federal officers could not do, claimant would be correct. *Elkins* v. *United States*, 364 U.S. 206 (1960). The district court, however, determined that, under the teachings of our opinion in *United States* v. *Aiudi*, 835 F.2d 943 (1st Cir. 1987), *cert. denied*, 108 S.Ct. 1273 (1988), "state-seized evidence is admissible in federal courts if it was obtained in accordance with federal requirements even though it may have been obtained by state officers in violation of state law." 696 F. Supp. at 787. In *Aiudi*, we held that a search conducted by state police pursuant to an invalid warrant did not necessitate the suppression of evidence in federal court because a federal agent on the scene had authority to do "legally . . . exactly what . . . the [state] police did unlawfully." 835 F.2d at 946. Although, here, there was no federal involvement in the search of claimant's apartment, the district court reasoned that *Aiudi*'s underlying principles still applied:

> First, where federal actors could have done lawfully what state actors may have done in violation of local law, there does not seem any reason to believe that the federal actors would encourage state actors to act lawlessly, the very evil proscribed by *Elkins*. Second, while it may be true that excluding such evidence from federal trials may deter state officials from future unlawful conduct, the exclusion of such evidence from state trials on any state offense seems to be a more "close-fitting" deterrent. [*Aiudi*,] 835 F.2d at 946.

696 F. Supp. at 786.

While the present case goes one step further, we think the result reasonable and in accordance with the law of this and other circuits. *See United States* v. *Jorge*, 865 F.2d 6, 10 n.2 (1st Cir. 1989) (state officers lawfully stopped car, and searched, but not beyond federal bounds; state law does not govern suppression issues in federal criminal trial); *United States* v. *Pforzheimer*, 826 F.2d 200, 204 (2d Cir. 1987) (citing cases from six other circuits). From the federal standpoint the property was fully subject to search at that hour, and this should be enough.

Whether the search was conducted in accordance with 18 U.S.C. § 3109[1] presents a more difficult question. Although the statute speaks in terms of "notice of . . . authority and purpose" and refusal of admission, the hearing below concentrated on the latter aspect. Here the court found the facts to be

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[1] § 3109. Breaking doors or windows for entry or exit:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

as follows. Claimant's building has a front entrance, and a side entrance near the back. Upon their arrival, the police officers divided into three teams: one team proceeded to the front door, the second to the side door, and the third team distributed itself around the building's perimeter. As the side door team proceeded toward the back of the building, they observed and heard the front door team knocking on the door. The side door team then encountered and detained a man exiting the side door. The side door had been left open by this man, and an officer named Landreville was the first to enter the building. The officer who followed Landreville through the side door into the hallway testified that they could hear knocking, and shouts of "Police," coming from the front door team. Landreville knocked on the back door to claimant's apartment unit, said "Police," and, after waiting five to ten seconds, entered the apartment unit. Inside the unit, the officers found claimant and two others in a bathroom. Narcotics paraphernalia were also found in the bathroom. The officers herded the men together in the kitchen. Shortly thereafter the front door team managed to break through both the building's front door and unit's front door.

The principal discussion at the hearing related to Landreville's waiting only five to ten seconds after knocking on the apartment's side door. *Cf. United States* v. *DeLutis*, 722 F.2d 902, 909 (1st Cir. 1983) (twenty seconds). However, this overlooks the evidence that even before Landreville reached the side entrance he heard the other team banging on the front and shouting "Police," which presumably was being heard in the apartment, and was not being responded to. The side team then had to deal with the individual who exited the side door, and pass through that doorway to the apartment's back door. The court said,

> The fact that the front door knocking continued and remained unanswered even before Landreville knocked

> on the back door certainly supports the inference that the occupants were not going to be promptly forthcoming. . . . . Landreville's knowledge that the occupants were not responding to the front door knocks contributed to a reasonable belief, formed five to ten seconds after he himself knocked, that an additional wait would be fruitless.

696 F. Supp. at 788. We do not find this unreasonable. The fact that the officers had probable cause to believe that the occupants possessed cocaine, a substance that is easily and quickly removed down a toilet is additional justification for the shorter wait before entry. *Cf. United States* v. *Tolliver*, 665 F.2d 1005, 1008 (11th Cir.), *cert. denied*, 456 U.S. 935 (1982) (compliance with § 3109 excused where availability of cocaine would be jeopardized).

With respect to announcement of purpose, in *Miller* v. *United States*, 357 U.S. 301 (1958), the Court held that the single-word "Police," spoken in a low voice, did not satisfy § 3109's requirements. "The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirement in this case." *Id.* at 309-10. The Court acknowledged, however, that an express announcement would be a useless gesture if the house's occupant already knew the police's purpose. *Id.* The focus, therefore, is properly not on what "magic words" are spoken by the police, but rather on how these words and other actions of the police will be perceived by the occupant. *Cf. Bosley* v. *United States*, 426 F.2d 1257, 1263 (D.C. Cir. 1970) (no announcement or further knocking required where officers believed sleeping occupant unable to hear them). Officers murmuring, "Police," as in *Miller*, may cause the occupant who hears them doubt as to their purpose. No such doubt will exist — although considerable apprehension is likely — when

officers pound on the door, yelling "Police!" They want in, presumably to search or arrest, not census-taking. We cannot think it would have made any difference to claimant's perceptions had the police here, in addition to yelling "Police," shouted "Search Warrant." *See United States* v. *Manning*, 448 F.2d 992, 1001, 1002 (2d Cir.) (en banc), *cert. denied*, 404 U.S. 995 (1971) (more detailed explanation than police identification "would not have made the slightest practical difference"); *United States* v. *Leon*, 487 F.2d 389, 394 (9th Cir. 1973), *cert. denied*, 417 U.S. 933 (1974); *cf. United States* v. *Wysong*, 528 F.2d 345 (9th Cir. 1976) (loudly voiced announcement "Federal Agents, open up" with loud knocking was sufficient notice); *United States* v. *Wylie*, 462 F.2d 1178, 1188 (D.C. Cir. 1972) (shouted announcement "police officer, open up," with knocking was sufficient notice).

It is true that Landreville, at the apartment site door, does not claim to have shouted. However, there was a fracas at the front door, and the occupants, who were reasonably believed to possess cocaine, should have little doubt of the police purpose. We are satisfied that the announcement, under the particular circumstances of this case, gave claimant sufficient notice under § 3109.

Affirmed.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA
Plaintiff

vs.

ONE PARCEL OF REAL PROPERTY WITH BUILDINGS, APPURTENANCES, AND IMPROVEMENTS, KNOWN AS 147 DIVISION STREET, LOCATED IN THE CITY OF WOONSOCKET, RHODE ISLAND
Defendant

ORDER OF JUDGMENT AND DECREE OF FORFEITURE

It now appearing that all claims filed herein have been either adjudicated or fully compromised and settled according to the Stipulations filed herein and it further appearing that no other claim to the defendant property has been filed since such property was seized;

Now, therefore, on Motion of Michael P. Iannotti, Assistant U.S. Attorney, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

1. That the claims of Jacqueline Price (Latraverse) and Paul A. Latraverse, Jr. are dismissed with prejudice;

2. That the claim of Eastland Savings Bank is allowed in the amount of $20,903.41 plus accrued interest of $184.13 as of July 14, 1988, plus interest at the rate of 9.25% per annum until payment is made.

3. That the United States Marshal shall recover his costs incurred in the prosecution of this action in the amount of two hundred fifty eight dollars and twenty-five cents ($258.25) from the five thousand dollars ($5,000.00) deposited by Jacqueline Price (Latraverse) and that the remaining four thousand seven hundred forty one dollars and seventy-five cents ($4,741.75) shall be returned to said Jacqueline Price (Latraverse).

4. That judgment is entered in favor of the United States of America and the defendant real property, together with buildings, appurtenances and improvements is forfeited to the United States of America with all right, title and interest thereto vesting in the United States of America, and the United States Marshal is authorized to dispose of said real property according to law.

BY ORDER:

_____

Clerk

ENTER:

_____

APPENDIX C

UNITED STATES of America

v.

ONE PARCEL OF REAL PROPERTY WITH BUILDINGS, APPURTENANCES, AND IMPROVEMENTS, KNOWN AS 147 DIVISION STREET, LOCATED IN the CITY OF WOONSOCKET, RHODE ISLAND.

Civ. A. No. 87-0203 P.

United States District Court,
D. Rhode Island.

May 19, 1988.

In federal forfeiture proceeding, building owner requested that evidence seized by state police officers be suppressed. The District Court, Pettine, Senior District Judge, held that: (1) state-seized evidence is admissible in federal courts if it was obtained in accordance with federal requirements even though it might have been obtained by state officers in violation of state law; (2) waiting five to ten seconds after officer knocked and announced "police" before forcing way into house for which officers had search warrant was reasonable, under federal law, where warrant was executed at approximately 9:30 P.M., and knocking on front door continued and remained unanswered before officer knocked on back door; and (3) under federal law, state officers who executed search warrant for house at approximately 9:30 P.M. were not required to have "good cause" to execute warrant at night.

Motion to suppress denied.

Michael P. Iannotti, Asst. U.S. Atty., Providence, R.I., for U.S.

John Baccari, Wakefield, Mass., Douglas A. Giron, Providence, R.I., for respondent.

MEMORANDUM AND ORDER

PETTINE, Senior District Judge.

In this federal forfeiture proceeding pursuant to 21 U.S.C. section 881(a)(7), Paul Latraverse asks this court to suppress evidence seized by state police officers alleging that the officers unjustifiably entered his apartment by force and that they executed the search warrant during the night without good cause for doing so.

INTRODUCTION

FINDINGS OF FACT

1. On July 1, 1986, Paul Latraverse owned a multi-dwelling building located at 147 Division Street, Woonsocket, Rhode Island, and occupied a ground level apartment therein.

2. There are two entrances to the building; a front door and a side door, which is close to the back of the building. The front door, a thick oak door with no windows ("front building door") opens into a small communal area which contains the front door to Latraverse's apartment ("front apartment door"). The side door leads to a small hallway off of which is the back door to the apartment.

3. At approximately 9:30 P.M., a team of officers from the Woonsocket police department arrived at the building to execute a state search warrant.

4. Upon arrival, the officers divided into three groups. Three officers, Daniel Pion, Detective Sansuisi, and an unnamed other proceeded to the front building door. Four officers, Herve Landreville, Sergeant Richard Flood, Detective Williami Shea, and patrolman Luke Gallant proceeded to the side door. The remaining officers positioned themselves at the perimeter of the building.

5. As the four officers proceeded to the side door, Daniel Pion, in the presence of the other two officers, began to knock on the front building door. As they approached the side door, the four officers encountered a man named Donald Oben exit the building. After brief questioning, Oben was "detained" by officer Gallant while the other three officers, finding the side door open, entered the hallway and prepared to enter the apartment. Landreville entered the hallway first and Flood followed.

6. According to Flood, once inside the hallway, they could hear Pion at the front door knocking and shouting "police."

7. Landreville testified that, after entering the hallway, he knocked on the back door to the apartment and said "police." He further testified that after approximately five to ten seconds, Flood stated, "let's go in" and then Landreville forced the door open with one kick. Flood testified that he did not hear Landreville knock or say police. I credit Landreville's testimony as accurately describing what transpired; all things being equal, when confronted with testimony about what one did and said and testimony about what one saw and heard, I must acknowledge the vulnerability of observation and choose the former over the latter. (Officer Gallant, who was still outside "detaining" Oben, did not see or hear what went on in the hallway.)

8. After kicking down the door, Landreville and Flood immediately entered a kitchen area, which was empty. Landreville observe an open door off the kitchen leading to what

appeared to be a basement; he descended the stairs. There was a bathroom off the kitchen and Flood observed the door closing and saw Latraverse and two other men inside. He ordered them to come out of the bathroom and had them sit at the kitchen table. Narcotics paraphernalia were found in the bathroom.

9. Meanwhile, the officers at the front door had encountered some difficulty. They finally managed to break through the front building door and officer Tempest immediately kicked in the apartment door. After passing through an empty living room, the officers proceeded to the kitchen area, where Latraverse and the other suspects were seated at the table under the supervision of Flood and Landreville. A full search ensued.

CONCLUSIONS OF LAW

[1] At the suppression hearing, there was considerable colloquy over whether state or federal law should be consulted to determine the validity of the officers' conduct. The government contends that federal law applies to all cases in federal court. Latraverse, however, argues that because the search was conducted by state officers pursuant to a state search warrant, Rhode Island law should govern.

While I would have presumed otherwise, this is a fairly disputed point among the federal district courts and courts of appeal. Some courts, for example, take the position urged by the government here. *See, e.g., United States v. Mitchell*, 783 F.2d 971, 973 (10th Cir. 1986) (federal court should ignore state knock and announce statute and evaluate conduct of state officials executing state warrant exclusively under the fourth amendment); *United States v. Combs*, 672 F.2d 574, 578 (6th Cir. 1982), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982) (admissibility of evidence obtained by state officers in prosecution in federal courts is to be governed

by federal law); *see also United States v. Hooks*, 780 F.2d 1526, 1535 (10th Cir. 1986), *cert. denied*, 475 U.S. 1128, 106 S.Ct. 1657, 90 L.Ed.2d 199 (1986) ("neither the statutes nor decisional law of the forum state control the admissibility of evidence in any p[illegible]e of a federal criminal action"); *O'Rourke v. City of Norman*, 640 F.Supp. 1451, 1452 (W.D.Okl.1986) (legality of search by state police in federal court governed by federal, not state law); *United States v. Barker*, 623 F.Supp. 823, 846 (D.C.Col.1985) (same). Other courts, however, have taken the position that state law should be consulted. *See United States v. Speaks*, 649 F.Supp. 1065, 1067 (E.D.Wash. 1986) (federal court must analyze motion to suppress evidence seized by state officials without federal intervention under state law subject to the minimal requirements of the federal constitution). Indeed, this court has previously stated that, even though a federal prosecution had ensued, "the lawfulness of an arrest by state officers for a state offense is to be determined by state law" subject to the strictures of the fourth amendment. *United States v. D'Alo*, 486 F.Supp. 945, 948 (D.R.I.1979).

Two early cases by the First Circuit indicate that state law controls the validity of the execution of a warrant by state officers even though the resultant evidence is sought to be introduced in federal court. In *Jackson v. United States*, 354 F.2d 980 (1st Cir. 1965), the court was confronted with a case somewhat similar to this one. There, four Boston police accompanied by two federal agents, executed a state arrest warrant at the defendant's home. In moving to suppress the evidence found in the course of the arrest, the defendant argued that the agents failed to comply with 18 U.S.C. section 3109. The court rejected this argument, however, holding that state law controlled the propriety of the entry. *Id.* at 981. Later in *United States v. Bradley*, 455 F.2d 1181 (1st Cir. 1972), *aff'd*, 410 U.S. 605, 93 S.Ct. 1151, 35 L.Ed.2d 528 (1973), the court

interpreted its *Jackson* ruling as standing for the proposition that "State law governs the arrest by state officials for federal offenses." *Id.* at 1185 n.8.

Were these cases the last word in this circuit on the admissibility of state-seized evidence in federal courts, I would be inclined to test the officer's conduct under state law and would exclude the evidence for conduct that did not meet its requirements. A recent first circuit case, however, suggests that even if the state police violated some state law, the evidence would not be inadmissible in a federal trial.

In *United States v. Aiudi*, 835 F.2d 943 (1st Cir.1987), *aff'd*, ___ U.S. ___, 108 S.Ct. 1273, 99 L.Ed.2d 484 (1988), Woonsocket police officers, believing that Aiudi was receiving stolen goods in violation of state law, executed a search warrant at the defendant's home. Prior to the search, an agent with the Bureau of Alcohol, Tobacco and Firearms (ATF) was investigating Aiudi for possible violations of federal firearms statutes, and was exchanging information with the Woonsocket police. At the time the Woonsocket police executed the warrant, they alerted the ATF agent, who arrived after the search had begun and, after reviewing various records and inventory of firearms, concluded that firearms violations were evident and instructed the police to seize certain evidence that was later used to convict Aiudi at his federal trial. The defendant argued that the Woonsocket search warrant was invalid and moved to suppress the evidence on the grounds that under the teachings of *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), evidence obtained by state officers in violation of the constitution cannot be handed over to federal officials for use in federal trials. The court rejected this argument, holding that "even assuming that the appellant is correct in his contention that the weapons were in fact seized by the Woonsocket police in violation of the fourth amendment, it does not necessarily follow that the evidence must be excluded." 835 F.2d at 945.

The court noted that while the state warrant may have been invalid, the federal agent, under federal statute, had authority to conduct a warrantless search. The court reasoned that:

> The *Elkins* rule was designed to protect fourth amendment rights by eliminating the incentive for federal law enforcement officials to encourage lawless searches and seizures by state officers. Where, as in this case, no incentive exists for federal officials to encourage misconduct by state police, exclusion of state-seized evidence is inappropriate without first considering whether the benefit obtained from excluding the evidence outweighs the resulting costs.

Id. at 946. According to the court, because federal officials "could legally do exactly what the appellant claims the Woonsocket police did unlawfully, admitting this evidence at trial does not give the ATF an incentive to encourage state law enforcement officials to violate the safeguards afforded by the fourth amendment." *Id.* at 946. While conceding that exclusion of the evidence may deter the Woonsocket police from future unlawful conduct, the court noted that the "benefit is minimal in light of the penalty that exclusion would impose on the federal government." *Id.* Moreover, the court reasoned, the state officers were searching for violations of state law and had only an "indirect interest" in Aiudi's federal prosecution; "The evidence would presumably be excluded at a state trial on the alleged state offenses; this is a more 'close-fitting' deterrent for the violations here." *Id.*

Aiudi clearly calls into question the proposition expounded in *Jackson* and *Bradley* that state law controls the conduct of state officers. If, as the *Aiudi* court indicates, evidence unlawfully seized by state officers will not be suppressed if federal officers could have lawfully obtained the evidence by the same

conduct, it seems meaningless to assert that state law determines the admissibility of state-seized evidence in federal courts. Of course, *Aiudi* involved state conduct that was violative of the federal constitution rather than state law, but its underlying principles seem to apply with equal force to state-law violations as well. First, where federal actors could have done lawfully what state actors may have done in violation of local law, there does not seem any reason to believe that the federal actors would encourage state actors to act lawlessly, the very evil proscribed by *Elkins*. Second, while it may be true that excluding such evidence from federal trials may deter state officials from future unlawful conduct, the exclusion of such evidence from state trials on any state offenses seems to be a more "close-fitting" deterrent. 835 F.2d at 946. As one court reasoned:

> We are not insensitive to the claim that we should not encourage state officials to violate principles central to the state's social and governmental order. [citations omitted] But sanctions already exist to control state officer's conduct. He is 'punished' by the exclusion of evidence in the state criminal trial, and the state can, if it chooses, enforce its policies with respect to its own officers by permitting civil suits. We are persuaded that the additional deterrent effect to be gained from excluding this evidence in federal trials for federal offenses is small, and is far outweighed by the costs to society of excluding the evidence. . . . We therefore conclude that federal law governs the validity of the trunk search, and that the district court erred in applying [state] law to assess its validity.

United States v. Rickus, 737 F.2d 360, 364 (3d Cir. 1984) [citations omitted]. Moreover, while I understand that some courts have held that "federal courts, in the interests of comity, should defer to a state's more stringent exclusionary rules," *United States v. Speaks*, 649 F.Supp. 1065, 1066 (E.D.Wash. 1986), it seems to me that the more salient principle is that "states are not free to impose on Federal courts requirements more strict that those of the Federal laws or Constitution." *United States v. Combs*, 672 F.2d 574, 578 (6th Cir. 1982), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982). As one court has stated, the rule that federal standards should govern admissibility in federal trials "is grounded in sound policy considerations. If the states could require federal courts to exclude evidence in federal criminal cases, some convictions would undoubtedly be lost, and the enforcement of congressional policy would be weakened." *United States v. Shaffer*, 520 F.2d 1369, 1372 (3d Cir. 1975).

I believe, therefore, that under the teachings of *Aiudi*, state-seized evidence is admissible in federal courts if it was obtained in accordance with federal requirements even though it may have been obtained by state officers in violation of state law. This rule not only conforms with the principles announced in many other circuits, *see, e.g., Rickus*, 737 F.2d at 363-64 ("Evidence obtained in accordance with federal law is admissible in federal court—even though it was obtained by state officers in violation of state law."); *United States v. Dudek*, 530 F.2d 684, 690 (6th Cir. 1976) (observing that there is an "impressive argument for the proposition that evidence seized in . . . violation of state law may nonetheless be admitted in a federal prosecution where the violation concerned would not be such as to require suppression of evidence under federal constitutional law, or federal statutory or case law"); *see also* W. LaFave, *Search and Seizure* 112-13 (2d ed. 1987) (collecting cases and observing that "if . . . state officers conduct a

search which is illegal under the law of the state where undertaken, the fruits thereof are not constitutionally barred from evidence in the federal courts"), but also conforms with the recognized principle that the "exclusionary rule is a judicially created remedy designed to effectuate the Fourth Amendment guarantees against unreasonable searches and seizures, not a personal right of a criminal defendant." *Aiudi*, 835 F.2d at 945. "[T]he rule is a needed, but grud[g]ingly taken, medicament; no more should be swallowed than is needed to combat the disease." *United States v. Janis*, 428 U.S. 433, 455 n.29, 96 S.Ct. 3021, 3032 n.29, 49 L.Ed.2d 1046 (1976) (quoting Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U.Pa.L.Rev. 378, 388-89 (1964)).

I will now turn to the question of whether, under the requirements of federal law, the officers' conduct was lawful.

[2] The first question raised by Latraverse is whether the officers waited a reasonable time, after knocking and announcing "police", before they forced their way into the house. Federal law provides as follows:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. section 3109. This requirement not only decreases the potential for violence and the destruction of property, *see United States v. Ruminer*, 786 F.2d 381, 383 (10th Cir. 1986), but also protects "the precious interest of privacy as summed up in the ancient adage that a [person's] house is his castle." *United States v. DeLutis*, 722 F.2d 902, 909 (1st Cir. 1983)

(quoting *Miller v. United States*, 357 U.S. 301, 307, 78 S.Ct. 1190, 1194, 2 L.Ed.2d 1332 (1958)). The time that must pass before an officer may conclude that he is being refused admittance and thereby justified in forcing entry depends, of course, on the circumstances of each case. *Ruminer*, 786 F.2d at 383-84; *United States v. Davis*, 617 F.2d 677, 695 (D.C.Cir. 1979), *cert. denied*, 445 U.S. 967, 100 S.Ct. 1659, 64 L.Ed.2d 244 (1980). In other words, the question is whether, given the circumstances, the officers were reasonable in assuming that they were not going to be let in and further waiting would be fruitless. *United States v. Ciammitti*, 720 F.2d 927, 934 (6th Cir. 1983), *cert. denied*, 466 U.S. 970, 104 S.Ct. 2342, 80 L.Ed.2d 816 (1984); *United States v. Allende*, 486 F.2d 1351, 1353 (9th Cir. 1973); *cert. denied*, 416 U.S. 958, 94 S.Ct. 1973, 40 L.Ed.2d 308 (1974); *Jackson*, 354 F.2d at 989. "Generally, a wait of 20 seconds is deemed adequate before the officers may force entry . . . [but] 10 seconds of silence . . . could mean that the occupant had not even started and hence was not going to." *DeLutis*, 722 F.2d at 909.

Here, when officers arrived at the house, Daniel Pion, in the presence of several officers, immediately began to knock on the outside front door while officer Landreville, sergeant Flood, and another proceeded to the side door. Officer Landreville, who was the first to enter the hallway through the side door, testified that he knocked on the back door to the apartment and said "police." At this point, the sounds of knocking on the front door could be heard in the hallway. Approximately five to ten seconds after Landreville knocked, Flood said, "Let's go in" and Landreville forced the back door open with one kick. After Flood found the three suspects assembled in the bathroom and "secured" them in the kitchen area, the officers at the front door finally managed to break their way into the apartment.

While five to ten seconds seems like an exceedingly short time before forcing entry, given the circumstances of this case I cannot say that it was unreasonable. First, this is not a case where the officers executed the warrant at some unsuitable hour when slumbering occupants would be expected to dally some before responding. *See, e.g., United States v. Rodriguez*, 663 F.Supp. 585, 588 (D.D.C. 1987). Second, given that the five to ten second wait at the back door, which in itself may be sufficient under *Jackson*, followed after the officers at the front door announced their presence, I cannot say that Landreville was unjustified in assuming that additional time would have been unavailing. The fact that the front door knocking continued and remained unanswered even before Landreville knocked on the back door certainly supports the inference that the occupants were not going to be promptly forthcoming. This is not to say that the announcement by one officer at the front door permits a second officer to crash through the rear door, although there is in fact some authority for that position, *see United States v. Bustamante-Gamez*, 488 F.2d 4, 10-11 (9th Cir. 1973), *cert. denied*, 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974) (holding that "officers are not required to announce at every place of entry" and approving an entry where officers made one announcement at the front door while seconds later other officers entered another), but it seems to me that Landreville's knowledge that the occupants were not responding to the front door knocks contributed to a reasonable belief, formed five to ten seconds after he himself knocked, that an additional wait would be fruitless.

Accordingly, I hold that the forced entry was reasonable under the circumstances.

[3] The second contention by Latraverse requires little discussion. His assertion that the officers did not have "good cause" to execute the warrant at night must fall since under

federal law, "daytime" is defined as meaning the hours betwen 6:00 a.m. and 10:00 p.m. *See* Fed.R.Crim.P 41(h). Here, the warrant was executed at approximately 9:30 p.m., rendering any showing of exceptional cause unnecessary.

For the foregoing reasons, the motion to suppress is hereby denied.

So Ordered.

No. 89-143

In the Supreme Court of the United States

OCTOBER TERM, 1989

PAUL A. LATRAVERSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether federal law governs the lawfulness of a search conducted by state police officers for purposes of determining the admissibility of evidence in a federal court.

2. Whether the police officers failed to comply with the knock-and-announce statute, 18 U.S.C. 3109, before entering petitioner's apartment.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-143

PAUL A. LATRAVERSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 873 F.2d 7. The opinion of the district court (Pet. App. 9a-21a) is reported at 696 F. Supp. 783.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1989. The petition for a writ of certiorari was filed on July 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On April 14, 1987, the government instituted this action for civil forfeiture under 21 U.S.C. 881(a)(7) (Supp. V

1987) against the real property located at 147 Division Street, Woonsocket, Rhode Island. The forfeiture complaint alleged that an apartment on the property owned by petitioner had been used to facilitate the commission of felony drug offenses in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner filed a claim to the property and moved to suppress a quantity of cocaine and narcotics paraphernalia seized by local police officers during the execution of a state search warrant for the apartment. The district court denied the motion to suppress, and it subsequently entered a judgment of forfeiture in favor of the government and against the real property. The court of appeals affirmed.

1. The evidence at the suppression hearing showed that officers of the Woonsocket police department executed a state search warrant for petitioner's apartment at approximately 9:30 p.m. on July 1, 1986. The apartment was on the ground level, and the building had front and side entrances. The front building door opened into a small communal area that led to the front door of petitioner's apartment. The side building door opened into a small hallway that led to the back door of petitioner's apartment. Upon their arrival, the police officers divided into three teams. Four officers approached the front building door, four officers proceeded to the side building door, and the remaining officers positioned themselves around the perimeter of the building. Pet. App. 4a, 10a-11a.

As the second team of officers proceeded to the side door near the back of the building, they observed and heard the first team of officers knocking on the front building door. When the second team reached the side door, they encountered a man leaving the building, and one of the officers detained him. The other three officers went through the side door, which had been left open, and proceeded down the hallway to the back door of petitioner's apartment. In the hallway, the officers could hear the first team knocking on the front door of the building and shouting "police." Pet. App. 4a, 11a, 19a.

When the officers reached the back door of petitioner's apartment, Officer Landreville knocked on the door and said "police." After waiting five to ten seconds, Officer Flood said, "Let's go in." Landreville then forced the door open, and the officers entered the apartment. Flood found petitioner and two other individuals in the bathroom, and he ordered them into the kitchen area. Pet. App. 4a, 11a-12a, 19a.

In the meantime, the first team of officers had been knocking at the front door of the building. After waiting 20 to 30 seconds, the officers broke open the door and proceeded to the front door of petitioner's apartment. One officer kicked the apartment door open, and the officers went through an empty living room to the kitchen, where petitioner and the other two individuals were seated at a table under the supervision of Officers Landreville and Flood. During the ensuing search, the officers found cocaine and narcotics paraphernalia in the bathroom, as well as additional smaller amounts of cocaine in other parts of the apartment. Pet. App. 4a, 12a; Pet. 7.

2. The district court denied petitioner's motion to suppress the evidence seized in the apartment. Pet. App. 9a-21a. It first ruled that federal, rather than state, law should be applied to determine the validity of the search. *Id.* at 12a-18a. The court therefore rejected petitioner's claim that the search was invalid because the search warrant did not authorize a night-time search in the absence of a showing of "good cause" by the officers under state law.[1] The court pointed out that Fed. R. Crim. P. 41(h) defines "daytime" to mean "the hours between 6:00 a.m. and 10:00 p.m." Pet. App. 20a-21a. Since "the warrant was executed at approximately 9:30 p.m.," the court concluded that "any

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[1] Rule 41(c) of the Rhode Island District Court Rules of Criminal Procedure provides in pertinent part that a "warrant shall direct that it be served in the daytime, unless for good cause shown it provides for its execution at any time of day or night."

showing of exceptional cause [was] unnecessary." *Id.* at 21a.

The district court also concluded that the officers had adequately complied with the federal knock-and-announce statute, 18 U.S.C. 3109, before entering the back door to the apartment.[2] Pet. App. 18a-21a. The court found that Officer Landreville was justified in entering five to ten seconds after knocking and announcing "police" because "Landreville's knowledge that the occupants were not responding to the front door knocks contributed to a reasonable belief, formed five to ten seconds after he himself knocked, that an additional wait would be fruitless." *Id.* at 20a. The court accordingly held that "the forced entry was reasonable under the circumstances." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-6a. Relying on its earlier decision in *United States* v. *Aiudi*, 835 F.2d 943 (1st Cir. 1987), cert. denied, 108 S. Ct. 1273 (1988), the court of appeals agreed with the district court's conclusion that "'state-seized evidence is admissible in federal courts if it was obtained in accordance with federal requirements even though it may have been obtained by state officers in violation of state law.'" Pet. App. 2a. The court accordingly concluded that the officers' execution of the search warrant at 9:30 p.m. did not render the search invalid because "[f]rom the federal standpoint the property was fully subject to search at that hour." *Id.* at 3a.

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[2] Section 3109 states:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

The court of appeals also agreed with the district court's ruling that the officers had complied with the federal knock-and-announce statute. Rejecting petitioner's claim that Officer Landreville was not justified in entering the apartment after waiting only five to ten seconds, the court emphasized that "even before Landreville reached the side entrance he heard the other team banging on the front door and shouting 'Police,' which presumably was being heard in the apartment, and was not being responded to." Pet. App. 4a. The court also noted that "[t]he fact that the officers had probable cause to believe that the occupants possessed cocaine, a substance that is easily and quickly removed down a toilet[,] is additional justification for the shorter wait before entry." *Id.* at 5a.

Finally, the court ruled that the officers had sufficiently announced their purpose by pounding on the front building door and yelling "police." Distinguishing *Miller* v. *United States*, 357 U.S. 301 (1958), the court emphasized that "[t]he focus * * * is properly not on what 'magic words' are spoken by the police, but rather on how these words and other actions of the police will be perceived by the occupant." Pet. App. 5a. Since the officers' conduct left no doubt as to their purpose, the court found that "it would [not] have made any difference to [petitioner's] perceptions had the police here, in addition to yelling 'Police,' shouted 'Search Warrant.'" *Id.* at 6a. The court therefore concluded that "the announcement, under the particular circumstances of this case, gave [petitioner] sufficient notice under [the federal knock-and-announce statute]." *Ibid.*

ARGUMENT

1. Petitioner renews his contention (Pet. 8-13) that the district court should have applied state rather than federal law to determine the validity of the search of his apartment. The court of appeals correctly rejected that contention. In *Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960), a case involving a search by state officers without federal

participation, this Court ruled that the lawfulness of a search for purposes of determining the admissibility of evidence in a federal court is a question of federal law. Subsequently, in *Preston* v. *United States*, 376 U.S. 364, 366 (1964), this Court added that "[t]he question whether evidence obtained by state officers and used against a defendant in a federal trial was obtained by unreasonable search and seizure is to be judged as if the search and seizure had been made by federal officers." See also *Cooper* v. *California*, 386 U.S. 58, 60-62 (1967); *On Lee* v. *United States*, 343 U.S. 747, 754-755 (1952); *Olmstead* v. *United States*, 277 U.S. 438, 468-469 (1928).

Contrary to petitioner's claim (Pet. 12-13), the decision of the court of appeals in this case does not conflict with the decision of any other court of appeals. The courts of appeals uniformly agree that the lawfulness of a search for purposes of determining the admissibility of evidence in a federal court is a question of federal law and that evidence may be admitted at trial if a search was valid under federal law, regardless of its legality under state law. See, *e.g.*, *United States* v. *Jorge*, 865 F.2d 6, 10 n.2 (1st Cir.), cert. denied, 109 S. Ct. 1762 (1989); *United States* v. *Mealy*, 851 F.2d 890, 907 (7th Cir. 1988); *United States* v. *Baker*, 850 F.2d 1365, 1368 n.2 (9th Cir. 1988); *United States* v. *Pforzheimer*, 826 F.2d 200, 202-204 (2d Cir. 1987); *United States* v. *Shegog*, 787 F.2d 420, 422 (8th Cir. 1986); *United States* v. *Mitchell*, 783 F.2d 971, 973-974 (10th Cir.), cert. denied, 479 U.S. 860 (1986); *United States* v. *Rickus*, 737 F.2d 360, 363-364 (3d Cir. 1984); *United States* v. *Montgomery*, 708 F.2d 343, 344 (8th Cir. 1983); *United States* v. *Butera*, 677 F.2d 1376, 1380 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Combs*, 672 F.2d 574, 578 (6th Cir.), cert. denied, 458 U.S. 1111

(1982); *United States* v. *Staller*, 616 F.2d 1284, 1289 n.7 (5th Cir.), cert. denied, 449 U.S. 869 (1980).[3]

2. Petitioner also renews his contentions (Pet. 13-18) that the officers violated the knock-and-announce statute, 18 U.S.C. 3109, because they did not give him sufficient time to respond to their knocking and because they failed to announce their purpose. The court of appeals correctly rejected those essentially factual contentions.

Petitioner first claims that the officers violated the knock-and-announce statute because they did not give him sufficient time to respond. As the courts below explained, however, "[t]he fact that the front door knocking continued and remained unanswered even before [Officer] Landreville knocked on the back door certainly supports the inference that the occupants were not going to be promptly forthcoming." Pet. App. 4a-5a, 20a. Petitioner's failure to admit the officers in those circumstances, coupled with the existence of probable cause to believe that petitioner had cocaine that he could quickly and easily dispose of, clearly justified Officer Landreville's entry into the apartment five to ten seconds after he knocked at the back door. Other courts of appeals have upheld the validity of searches when the delay between announcement and entry was similarly brief. See, *e.g.*, *United States* v. *Ruminer*, 786 F.2d 381, 384 (10th Cir. 1986) (5-10 second delay); *United States* v. *DeLutis*, 722 F.2d 902, 908-909 (1st Cir. 1983) (20 second delay); *United*

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[3] Petitioner's claim of a conflict (Pet. 11) rests principally upon dictum in *United States* v. *Henderson*, 721 F.2d 662, 664-665 (1983), cert. denied, 467 U.S. 1218 (1984), in which the Ninth Circuit, in upholding the denial of a suppression motion, declined to decide "[w]hether information secured by state officers entirely without federal involvement should be admissible notwithstanding violations of state law." In *United States* v. *Chavez-Vernaza*, 844 F.2d 1368, 1372-1374 (1987), however, the Ninth Circuit rejected the *Henderson* dictum and made clear that the admissibility of evidence obtained through a search by state officers is governed by federal law even where there was no federal participation in the search.

States v. *Davis*, 617 F.2d 677, 695 (D.C. Cir. 1979), cert. denied, 445 U.S. 967 (1980) (15-30 second delay); *United States* v. *Wysong*, 528 F.2d 345, 348 (9th Cir. 1976) (5-10 second delay); *McClure* v. *United States*, 332 F.2d 19, 21 (9th Cir. 1964), cert. denied, 380 U.S. 945 (1965) (4-5 second delay); *Masiello* v. *United States*, 317 F.2d 121, 122 (D.C. Cir. 1963) (20-50 second delay).

Citing *Miller* v. *United States*, 357 U.S. 301 (1958), petitioner also contends that the officers violated the knock-and-announce statute because they failed to announce their purpose.[4] In *Miller*, this Court observed that the knock-and-announce statute prohibited law enforcement officers from forcibly entering a suspect's apartment "without first giving him notice of their authority and purpose." 357 U.S. at 313. But the Court also acknowledged that in some cases "[i]t may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture." *Id.* at 310. Thus, as the court of appeals explained in this case, the proper focus is "not on what 'magic words' are spoken by the police, but rather on how these words and other actions of the police will be perceived by the occupant." Pet. App. 5a. See also *United States* v. *James*, 764 F.2d 885, 888 (D.C. Cir. 1985); *United States* v. *Wysong*, 528 F.2d at 348; *United States* v. *Leon*, 487 F.2d 389, 394 (9th Cir. 1973), cert. denied, 417 U.S. 933 (1974); *United States* v. *Wylie*, 462 F.2d 1178, 1186-1187 (D.C. Cir. 1972); *United States* v. *Manning*, 448 F.2d 992, 1001-1002 (2d Cir.) (en banc), cert. denied, 404

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[4] Petitioner points out (Pet. 17) that the district court did not make any specific findings that the officers stated their purpose before entering the apartment. It appears, however, that the district court did not make any such findings because at the suppression hearing petitioner challenged only the timing of the officers' entry. See Gov't C.A. Br. 11-12.

U.S. 995 (1971). In this case, petitioner and the other apartment occupants responded to the officers' knocking and shouting "police" by gathering in the bathroom. Pet. App. 4a. The court of appeals reasonably concluded that under the circumstances presented here, petitioner had "little doubt of the police purpose" and the officers were not obligated to engage in a further elaboration before entering. *Id.* at 5a-6a. That conclusion does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied. Respectfully submitted.

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